Supreme Court, U.S.
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(2)

No. 96-1906

In The

Supreme Court of the United States

October Term, 1996

STEVEN LOWE,

Petitioner,

v.

NUECES COUNTY, TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respectfully submitted,

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QUESTION PRESENTED

Whether Nueces County may rely on state law for policy regarding the use of deadly force or whether it is required to ignore the state law regarding certification of peace officers and put into writing an entirely different policy that specifically names courses that each new hiree to the position of deputy constable must complete prior to being hired.

Whether a county governmental agency which follows state law on the adequacy of training police officers in the use or non-use of deadly force may avoid liability under § 1983 when a state agency has dictated which courses must be taken and passed before one can become a certified police officer. And such county agency has no reason to offer even more specialized training in the area in light of *City of Canton Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1987).

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RESPONSE TO WRIT OF CERTIORARI

Nueces County respectfully moves the Court to deny Steve Lowe's petition, and allow the judgment of the District Court for the Southern District of Texas and the Fifth Circuit to stand.

OPINIONS BELOW

The Fifth Circuit's opinion is App. 1. A transcript of the hearing on the District Court's oral ruling granting summary judgment is App. 2.

JURISDICTION

The District Court had federal question subject matter jurisdiction because Lowe asserts a claim under 42 U.S.C. § 1983.

The Fifth Circuit had jurisdiction because the District Court properly exercised jurisdiction and Petitioner filed a notice of appeal on March 6, 1996 from the final judgment signed on February 6, 1996. The Fifth Circuit's opinion and judgment issued on December 3, 1996. The motion for rehearing was filed on December 24, 1996, and overruled on January 9, 1997.

This petition was filed on April 9, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.
U.S. Const. amend IV.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
42 U.S.C. § 1983.

RESPONDENT'S REPLY

I.

STATEMENT OF THE CASE

Course of proceedings and disposition in the District Court

Petitioner sued Nueces County, the City of Corpus Christi, John Casares and Bobby Munson under 42 U.S.C. § 1983. Petitioner dismissed his claims against the individuals, Munson and Casares and settled a pendant Texas

Tort Claims Act case against the City of Corpus Christi and then dismissed his § 1983 case against the City. Nueces County remained. The Trial Court then granted the County's motion for summary judgment on Petitioner's alleged violations of § 1983. Petitioner now appeals.

Statement of facts

On May 10, 1991, Petitioner was shot by two officers, Munson and Casares. Munson was employed by Nueces County, Casares by the City of Corpus Christi. Munson had been contacted by Casares to assist Casares in "a man with a gun" case. In fact Casares had informed Munson that the gunman had almost ran Casares off the road with reckless driving and gun pointing. Arriving at the location where Casares had tracked the gunman, Munson took the lead as a uniformed officer relying on another peace officers eyewitness accounts. The officers arrested and secured one of the gunman's friends outside the apartment. Moving to the open door of the underlit apartment, the officers smelled marijuana and saw appellant, the gunman, standing with his back to the door. The officers yelled "freeze police". The gunman turned quickly and in a split second in a darkened apartment, the officers thought he still had the gun in his hand and fired upon him. Later no gun was found, but Munson could not know at the time that the information provided by a fellow peace officer was faulty.

II.

ARGUMENT

Petitioner sued Nueces County under 28 U.S.C. § 1983 for the actions of Bobby Munson, a reserve deputy constable. In order to maintain such an action, Petitioner had to show that Munson's actions where the result of some policy or custom of Nueces County, and but for that custom or policy Petitioner would not have been injured. *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

Petitioner's argument is simple, even if ultimately flawed. Petitioner argues that 1) Munson's training was inadequate because it was only that which the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE); 2) Munson's selection was flawed because one of his former employers signed an after the fact affidavit stating that if his office had been contacted, Nueces County would have found out that Munson was indeed prone to violence; and 3) Since Munson was alone in a vehicle at the time he was contacted by John Casares, there was improper supervision of reserves by Nueces County.

Petitioner's briefs continue to read like *bad* dime store novels. Petitioner attacks the District Court, Precinct One Constable Johnny Alaniz and even the United States Supreme Court. To respond to the Petitioner's logic twisting arguments would be meritless as he has not *changed* the facts to suit his needs. Nueces County maintains the same simple and straightforward argument it presented to the District Court.

III.

FACTS AND PROCEDURAL HISTORY

Nueces County Precinct One Constable supplements his paid deputy constable force with reserves (unpaid volunteers), an uncontroverted fact. Petitioner likened reserves to candy stripers he says because that is what Chief Deputy Boucher had done, but Petitioner forgets or more exactly twists the fact that "candy striper" was among a list that also included volunteer firemen. Truth is the only difference under Texas law between a reserve and a regular peace officer is that one is paid and the other is not. D.E. #21, Ex. D, R. pp. 2868-2871. Tex. Code Crim. Proc. art. 2.12-13.

On the night in question, Bobby Munson was returning the patrol vehicle to the courthouse where patrol units are kept when not in service. John Casares, a person known to Munson as a certified peace officer stopped Munson and asked his assistance in a man with a gun situation. Casares explained that a man had just tried to run him off the road and had pointed a gun at him. Under Texas law, peace officers are allowed to respond to and investigate anonymous calls. Here Munson was relying on the word of a sworn peace officer. *Guzman v. State*, 521 S.W. 2d 267 (1975). Munson had already taken a course similar to "shoot don't shoot", just not called by that name, but "What is Deadly Force and the Use of it". This was not a "book learning" course D.E. #21, Ex. A, R. pp. 2829-2831. Munson and Casares felt that they could handle the situation and relying on training and directives investigated and shot Petitioner. However unfortunate Petitioner's injury, he cannot thrust a constitutional

violation upon Nueces County. Petitioner twists logic when he does not define "shoot don't shoot" but said that Munson recanted having taken similar training, Munson did not recant at D.E. #22 Ex. B, R. p. 2485, D.E. #22, Ex. R, pp. 2521-2522, Munson simply states what other courses may contain.

IV.

ANALYSIS

Petitioner states that Nueces County failed to properly train deputy constables in the use of reasonable force. As noted in the attached deposition excerpts of Bobby Munson D.E. #21, Ex. A, R. pp. 2819-2841. Bobby Munson was at all times a licensed peace officer. Bobby Munson was licensed by the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) by and through the Texas Government Code § 415. Texas law mandates what training is needed by those attempting to acquire or maintain a peace officer's license. D.E. #21, Ex. B, R. pp. 2843-2851 outlines TCLEOSE requirements for 1) § 211.77, the minimum training standards for peace officers; 2) § 211.79, the inservice training credit for license holders; 3) § 211.80, minimum standards for licensing; 4) § 211.65, academy licensing; 5) § 211.66, agreement for training. D.E. #21, Ex. C, R. pp. 2853-2857 relates the course outlines that TCLEOSE provides in response to § 211.65 and § 211.66 of its internal regulations, in regards to reasonable force training. As can be seen in D.E. #21, Ex. B and D.E. #21, Ex. C, another agency regulates training of certified peace

officers and not Nueces County. There is no law or constitutional provision that mandates Nueces County must train above and beyond what TCLEOSE requires.

Petitioner's claim that Defendant Munson repeatedly requested training in different areas of law enforcement are not supported by any evidence. As a matter of fact the only training Defendant Munson was not provided by TCLEOSE or Nueces County that Plaintiff hangs his hat (case) on is that Munson was not given the "Shoot, Don't Shoot" training that was sometimes offered by the Nueces County Sheriff's Department. However, Munson states in D.E. #21, Ex. A that he receive similar training while in the military, prior to coming to Nueces County Precinct One as a volunteer. Munson depo. at D.E. #21, Ex. A, R. p. 2830 Petitioner further discovered from Munson that, Munson knew that while not the same course as Nueces County offered, the military course expressed the purpose to increase the judgment of the armed officer. Munson depo. at D.E. #21, Ex. A, R. pp. 2831-2834. Munson was trained and supervised by Precinct One further by having to ride with a field training officer from November 1990 through January 1992. Munson possessed extensive training in law enforcement, prior to volunteering with Precinct One:

1) Military Police – 1½ years;

2) Arizona Department of Corrections – 1 year;

3) Kleberg County, Texas, Reserve Deputy – 1 year.

Munson's Naval training alone is impressive as well as extensive. See Boucher depo. excerpt attached as D.E. #21, Ex. D, R. pp. 2859-2894. As a matter of law before Petitioner could prevail under § 1983, he would have to

show that inadequacy of training amounted to deliberate indifference, however, since another agency by state law has certified to Nueces County that Munson possessed adequate training (TCLEOSE) Petitioner must go further and show that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the county can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the county is responsible, and for which the county may be held liable if it actually causes injury. *City of Canton Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989). Nothing that Petitioner has complained of is any different than what TCLEOSE would/ should have anticipated a peace officer would encounter on routine patrol. There is nothing unique to Corpus Christi in which Munson was not trained. Petitioner has not identified any deficiency in Precinct One's hiring, training, supervising of Munson. Petitioner makes the assertion that Munson's psychological profile showed him to be unfit. Such an assertion is false. Even after the complained-of incident, Munson's psychological profile showed him fit for the job. See Munson's psych. attached as D.E. #21, Ex. A. In *City of Canton* at 1206 the Supreme Court states that the deficiency must be pointed out and proved, in this case Petitioner has pointed out suspected deficiencies, but through his discovery he has proven that such deficiencies *do not* exist.

Secondarily, Petitioner alleges that Nueces County failed to reasonably review the employment background

of Munson. As seen in deposition excerpt of Douglas Tenore D.E. #21, Ex. E, R. pp. 2893-2906, a pre-employment check was done on Bobby Munson, and there were no reports that Bobby Munson was prone to use of excessive or undue force.

Monell specifically rejected government liability based on the doctrine of respondeat superior. Thus, Nueces County cannot be held liable under § 1983 merely because Bobby Munson was a volunteer with Nueces County Precinct One Constables office. Petitioner has yet to show, offer, or discover any evidence that Nueces County condoned any of the alleged actions of Munson and certainly no evidence that Nueces County or any supervisory personnel was present at the scene of the alleged incident. In order to establish supervisor liability Petitioner must show that the inaction on behalf of Nueces County amounted to reckless disregard, deliberate indifference to or tacit authorization of constitutional violations, and not mere negligence. *Howard v. Adkinson*, 887 F.2d 134 (8th Cir. 1989); *Rascon v. Hariman*, 803 F.2d 269 (7th Cir. 1986); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553 (1st Cir. 1989); *City of Canton v. Harris*, 109 S.Ct. 1197 (1989).

Finally under "custom and usage", the Supreme Court has ruled that those practices of state officials must be so permanent and well settled to constitute a "custom and usage". *Adickes v. S.H. Kress and Co.*, 398 U.S. 144 (1970). See also *Monell*. Petitioner has not and cannot plead or prove that Nueces County allowed the alleged behavior to occur on any type of basis (regular or irregular). Petitioner alleges only a single event and in *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), the Supreme

Court ruled that a single, unusually excessive use of force could not stand on its own to make a governmental body liable under § 1983 for the theory of failure to train, supervise or discipline.

Petitioner's claim that Nueces County condoned Munson's act flies in the face of reality. Munson was released as a volunteer with Precinct One Constables office and prosecuted to the fullest extent of the law by the Nueces County District Attorney. See attached D.E. #21, Ex. A.

In an effort to bolster his claim, Petitioner proffered the affidavit of former Kleberg County Sheriff Adan Munoz, a former employer of Bobby Munson. Munoz claims that if anyone from Nueces County had contacted him or his office, he or his office would have told them that Bobby Munson, who was a reserve deputy under Munoz, would be prone to violence. Utter tripe, but nonetheless a matter which might have raised a fact issue. However, Munoz' affidavit was attacked on the grounds that he swore to matters that he could not have had any personal knowledge. Mr. Munoz could only swear that no one called him, further he could not speak for the records of Kleberg County since at the time he signed the affidavit he was not the sheriff or custodian of the records. Nueces County submitted a motion along with exhibits to show the District Court exactly what someone would find out if they contacted the Kleberg County Sheriff's Office in regards to Bobby Munson. D.E. #43, Ex. B, R. 290-291. What Nueces County found was no mention of Munson being violent or gun happy.

Grandstaff Rebuttal

Petitioner makes some noise about Nueces County ignoring what occurred during the incident made the basis of this suit. First, the Constable did not have to investigate the incident, an independent law enforcement agency had already done so. It would have been the height of government redundancy to conduct another investigation. Second, because Major Couser and Chief Deputy Boucher said nothing could be learned from this incident does not infer that excessive force was approved of by Nueces County. Petitioner slips by the very real fact that his own experts, Couser and Boucher, all say that if Munson believed that he was about to be fired upon (having already received information from another peace officer that Petitioner possessed a weapon) then he was justified in using the force he used. Thus, there was no excessive force by Munson. Petitioner's expert begins with the assumptions that Munson and Casares were too green or too stupid to conduct *any* type of investigation, then moves to the outright conclusion that:

> "3. Commonly accepted and nationally recognized standards of police procedure were not followed by defendant officers (Munson and Casares) with specific regard to matters relating to, but not limited to:
>
> a. the investigation of crime,
>
> b. warrantless arrest, search and seizure,
>
> c. apprehension techniques,
>
> d. use of force, deadly force, and alternatives."

D.E. #32, Ex. D, R. 1021. Hard to imagine TCLEOSE missing out on teaching "commonly accepted and nationally recognized standards" in the above basic training courses. Already stated above were the TCLEOSE course requirements and outlines. A policy to follow the law is not void because someone violated the policy. A policy to follow basic and standard training is not void because someone failed to follow the policy. This is not the same case as Petitioner would have this Court drape over the skeleton of *Grandstaff v. City of Borger, Tex.*, 767 F.2d 161 (5th Cir. 1985). In *Grandstaff* this Court recognized that inaction after the shooting of a *clearly* innocent man by numerous police officers could have led a jury to believe that there was a policy to shoot innocents. In *Grandstaff* there were no dismissals or prosecutions; here Munson was dismissed. Here Munson is with the eyewitness and can see that the person wheeling around is not an "innocent" man but the actual gunman according to Casares. *Grandstaff* was not and is not Lowe.

V.

CONCLUSION

Petitioner would have the Courts make "Shoot Don't Shoot" a constitutional right for citizens of the United States. What does this mean? Must all law enforcement officers take only this course? What a boon for the producers of that particular course. The District Court did not err when it chose not to hold that Lowe had a constitutional right to have Munson take "Shoot Don't Shoot" specifically. Petitioner believes that but for this course, the shooting would have been prevented because

Casares, the fellow who did not take this course or any similar course, says it would have done him some good – he dismissed Casares. For Petitioner, reality has finally intruded upon the sanctity of his fantasy.

The District Court did not err in granting summary judgment, nor did the Fifth Circuit err in affirming the District Court's ruling, since there was not material fact issue in dispute.

PRAYER

Respondent prays that this Honorable Court affirm the District Court and the Fifth Circuit by denying Petitioner's request for a Writ of Certiorari thereby upholding Nueces County's Summary Judgment.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-40224

STEVEN LOWE,

Plaintiff-Appellant,

versus

JOHN GABRIEL CASARES, Individually, and In his Official Capacity as Safety Officer for the City of Corpus Christi Police Department, ET AL.,

Defendants,

NUECES COUNTY, TEXAS,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

(CA-94-CV-234)

(Filed Dec. 03, 1996)

Before REAVLEY, GARWOOD and BENAVIDES, Circuit Judges.*

---

*Pursuant to Local Rule 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

PER CURIAM:

Having considered the briefs and the relevant portions of the record, this Court concludes that the district court properly granted the motion for summary judgment of defendant-appellee Nueces County. For the reasons orally stated by the district court, we agree that there was no summary judgment evidence which would sustain a finding that any of the claimed deficiencies in training or hiring policy on the part of the County amounted to deliberate indifference to the constitutional rights of its residents as required by *City of Canton v. Harris,* 109 S.Ct. 1197 (1989). Nor has an adequate nexus been shown between the alleged training or hiring inadequacy and the injury suffered, as required by *City of Canton. See also City of Oklahoma City v. Tuttle,* 105 S.Ct. 2427, 2436 (1985). As Munson was released from his position as reserve deputy constable and was prosecuted by the Nueces County district attorney, and as there was an investigation into the incident, albeit not by the precinct one constable, *Grandstaff v. City of Borger,* 767 F.2d 161 (5th Cir. 1985), is not in point. The judgment of the district court is accordingly

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

STEVEN LOWE, PLAINTIFF,	)	CIVIL ACTION CA-C-94-234
VS.	)	CORPUS CHRISTI, TEXAS JANUARY 11, 1996
CITY OF CORPUS CHRISTI, ET AL, DEFENDANTS.	)	(Filed May 8, 1996)

FINAL PRE-TRIAL CONFERENCE

BEFORE THE HONORABLE HAYDEN W. HEAD, JR., JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT

APPEARANCES FOR:

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THE COURT RECORDER: MS. JUDITH F. ALVAREZ

PROCEEDINGS RECORDED BY
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* * *

[p. 2] (Proceedings commenced at 8:56 a.m.)

THE CLERK: C-94-234, Steven Lowe versus City of Corpus Christi. May I have appearances, please.

MR. BRYAN: Walter Bryan and Sandy Gill for Nueces County.

MR. ALLISON: Doug Allison for plaintiff Steve Lowe.

MR. TERRY: Michael Terry for City of Corpus Christi.

THE COURT: We need to talk some more about these motions for summary judgment. Do you want to be heard, Mr. Terry? Then why don't you two be seated. Do you want to be heard anymore?

MR. TERRY: Not unless Your Honor has specific questions.

THE COURT: Mr. Bryan, do you want to address the Court any further with respect to your motion?

MR. BRYAN: Yes, Your Honor. I don't know if the Court wants me to do it from behind the podium.

THE COURT: You can stay where you are.

MR. BRYAN: Your Honor, we still feel that on the training issue that is before the Court is that all of the evidence that we submitted at summary judgment time shows that Mr. Munson had had that particular training, the shoot-don't-shoot, that was simply called something else that he had while he was in the military. We also submitted for the Court Mr. Munson's [p. 3] training background and everything that they say that Mr. Munson needed he had gotten not only at Del Mar but he had also gotten the same exact training from the military police. And, as a matter of fact, other than training for excessive force –

THE COURT: Thank you. Do you have anything? I don't mean to interrupt. I just remember all this. I remember. I've heard this before.

MR. ALLISON: Nothing new unless there's a specific area.

THE COURT: You don't have a constitutional case and the motions are granted. You have a Texas Tort Claims Act case against one defendant, the City of Corpus Christi. You don't have a Texas Tort Claims Act case against the City – I mean against the County. We can take it a couple of different ways here. And I know you feel strongly about this case and I don't blame you for feeling strongly abut the case, because I feel strongly about it, too. But the facts don't add up to a constitutional claim. With respect to training, both officers were

required by their employers to be certified police officers and to undergo the requirements – the educational requirements and the training requirements of the State of Texas before they could be certified police officers. The shoot-don't-shoot theory has no merit except common sense in your view and maybe other views. It's not a requirement of the State of Texas. One deficiency in training does not amount to a constitutional [p. 4] violation. There is no gross negligence or deliberate indifference on the part of any of these governmental institutions in their decision to hire and train these two men. Could it be done better? It can be done better. It could have been done better in both instances. That's not the standard. It is not a negligent standard. And interestingly, the training issue with respect to shoot-don't-shoot, which I think is the major part of your case here, has some factual basis for its desirability in the part of the records of the defendant, and the fact that they want Nueces County or the particular constable's office involved had that as a program, as a step. I think there's some evidence in the record that maybe Munson might have had it similarly. But the fact is is [sic] that the reason that he didn't have it here is its unavailability in the region. There is no evidence in the record to suggest that any one in the region sponsors it. What your approach to the case would result in would be a decision that would say that by fiat – by judicial fiat that no officer is properly trained unless he has – or she has shoot-don't-shoot course. Secondly, you've got to have it here in the area and available at all times. And thirdly, the requirements of the State of Texas that don't require it are constitutionally invalid. I'm not going to make that step. I think that the State of Texas,

when it licenses and certifies its peace officers, as I read the requirements and as I went through them, are reasonable, thorough-going requirements, and that the [p. 5] communities and municipalities that hire certified police officers have a right to rely upon the statements of the Texas Commission on Law Enforcement, Officer Standards and Education, is what's appropriate unless the particular offices – officer is going to be doing a particular type of police work of need for specialized training. That's not the – that's not what happened in either one of these cases. There's no reason to require further training beyond the ordinary, and no reason for any community to expect that once they have a certified police officer before them that it is an unconstitutional part if they don't do something else, because you say here "shoot-don't-shoot", somebody else comes along and finds another exception. Maybe in a Texas Tort Claims case some jury will decide the opposite. I don't think so. But it's not going to be the decision of this Court that 42 USC 1983, the Civil Rights statute, shows that it is a violation of a citizens's civil rights because the community employing the police office has not employed a shoot-don't-shoot standard which is not required by state law.

Now, hiring. You have two different hirers. You haven't alleged that the City did anything improper when it hired Casares. What you've alleged is with respect to Munson, that there should have been an examination – a more thorough-going examination into Munson's background. The sole, as far as I can tell – the sole fault you find with that aspect of it is that the City didn't call Munson's last employer – or the [p. 6] County didn't call Munson's last employer, but what the County did do

was (a) when they hired him make sure he was certified, put him through a training course. He did go through a graduated – and that's training, I'll have to get back into that, I resolved that for myself. There was a background check accomplished. The only untoward thing he didn't do – that the City – that the County didn't do was to call the last employer. Would that have been a smart thing to do? Yeah, that would've been a smart thing to do. Would you do it? Probably. When you hire somebody for your office? Probably. Is it grossly indifferent – I mean, is it consciously indifferent and grossly negligent if you don't? No, it's not. That is only one factor out of an entire array of factors that Nueces County undertook when they hired this man. They obtained his background. They put him through an examination and a T-close (phonetically) examination. I don't find anything wrong with the hiring aspects of it.

You want also to re-address two policies that the Government has re-addressed – not re-addressed, read-just – two policies that I think are constitutional policies and that the communities can undertake. That is (a) the existence of reserve officers and (b) the way the City of Corpus Christi has the police officers occupying dual roles or triple roles – multiple roles at the airport. You find fault with the decision of the constable here, and as far as I can tell it would be like a [p. 7] sheriff's office or anyone else that has reserve officers, and you find fault that they handle them differently than they do their full-time deputies. And you say that they – both of them are somehow secondary police forces. First of all, it's not an unconstitutional policy to have reserve officers or multi-purpose employees at an airport. Those are constitutional

choices that can be made by a City. They are not made with gross indifference – or County, they're not made with gross indifference or grossly negligent. We should be glad that there are persons who want to be reserve officers and contribute their time and be willing to serve for no pay. It may be easy for some to look down their nose or make a slight knowing smirk while they're just a reserve officer and they just like to ride around and act like cops. But the fact is is that those persons provide a substantial benefit to the community. They are provided for by statutes of the State of Texas. They exist with the blessings of the persons – the people of the State of Texas because they recognize their service can be valuable. Now the fact that the City – County wants to train them differently than the – than the – they train their full-time persons is not unconstitutional. You have not really shown anything more than the fact that they are trained differently, but there's no causation here between that training – or that treatment. You like to call it a second class or a lower caste [sic]. I don't call it that. I see it as different functions. I see it as [p. 8] different people. Now you say they had the same function at the time. Yes, they do. And I think they are trained and permitted to do that. They have the T-close training. That satisfies me.

Now, with respect to the City of Corpus Christi and the way it hires its airport security police. Would it be better to have policemen onboard the Corpus Christi Airport all the time? Probably would. Would it be better to have – and that's because they wouldn't have any confusion about their duties, whether or not they're also supposed to be firemen or greeters or whatever they're supposed to do. Maybe it'd be better to have SWAT-team

members there all the time, too. But the City Council can make that choice. They can decide – that's not an unconstitutional policy. That's not an unreasonable thing for them to do. These persons that they hire are trained. They are certified police officers. They can be hired for a police-officer duty and they can call in assistance when they need it. That's a choice that the City can make and you can't say that that's an unconstitutional choice. That's not grossly negligent, it's not consciously indifferent; it's a choice. Maybe a better choice can be made. I don't know. But this isn't about negligence. It's about gross negligence and conscious indifference and that's not here.

Would it be better – and we talk about whether or not his – Casares – if there's some problem with him acting off the premises and the City bears some responsibility for [p. 9] that. I don't see any other instance in this case where any security officer has acted off the premises that hasn't been corrected. There's obviously no policy of the City of Corpus Christi that they act off of the premises in any way. First of all, that's clearly seen by the fact that they're not Corpus Christi police officers. They don't have a patch that says Corpus Christi police officers. They don't have that chain of command. They don't wear that uniform. They don't show up at the police station. They're not assigned patrols in the city of Corpus Christi. They can't give tickets. They're not given authority to arrest. They're not on the vice squad. They're not on any other squad. They're not part of the police department. They're obviously hired to do airport work. And if we had some indication in the record that they were going beyond that on a consistent – persistent basis, I'm sure

you would have brought it to me. We don't have that in this case.

What we have is one police officer who sees a violation – or one security officer who sees a violation and calls a police officer. He does what he's supposed to do. He doesn't go there and say to himself, "I'll handle this situation." He says, "I'll go find a cop." That's what he did. That's what he was supposed to do. It went bad after that. But that's not, in my view, as a result of any gross negligence or conscious indifference on the part of the City or Mr. Hecht by him failing to say, "Okay, you can only work on airport [p. 10] premises." I think it's obvious that that's what was occurring in this case. So that's my decision.

You can't have a tort claim against the County. There's no County property involved and he's been excluded by the Tort Claims Act case because he's not an employee. So, therefore, you have a lawsuit against Mr. Terry for Texas Tort Claims Act case. We'll try that case on Monday. Ready?

THE CLERK: Tuesday.

THE COURT: Tuesday. Are you ready?

MR. ALLISON: Yes, sir.

THE COURT: Are you ready?

MR. TERRY: Yes, Your Honor.

THE COURT: How long will the case take to try?

MR. ALLISON: Obviously –

THE COURT: You've got the week. I just want to know.

MR. ALLISON: I think it will still take most of the week. Probably all of it, since it's a short week.

THE COURT: What do you think?

MR. TERRY: Week.

THE COURT: Okay, whatever it takes. So, that's the way I see your case. I've given it a lot of thought, because we all want – we all want to see situations like this avoided, but I cannot see that there has been any constitutional violation, and that's a different than a negligent standard that I know you're used to dealing with. I just don't see it here. That's [p. 11] the way I call it. So, now, we have to – do you want to re-draft the pre-trial order given where we are? Or do you want to somehow amend where we are and somebody show me what the – show me the pre-trial order here and –

MR. TERRY: I would prefer an opportunity to confer with counsel before we address the pre-trial order. I do think it needs to be amended.

THE COURT: Do you want to come back at 1:00 o'clock?

MR. TERRY: Yes.

THE COURT: How about 1:30? Maybe you can settle the case. Is that why you asked? Those are nice things. Two o'clock. You're excused.

(Recess from 9:17 a.m. until 2:01 p.m.)

THE COURT: I'm advised that there is a settlement in the case and we do not need to pick a jury. Is that correct?

MR. TERRY: It is, Your Honor. The City of Corpus Christi and Steven Lowe have reached a settlement whereby the City of Corpus Christi will pay to Steven Lowe $125,000 plus costs of court incurred in the prosecution of this case against the City of Corpus Christi.

THE COURT: Is that correct?

MR. ALLISON: That is correct.

THE COURT: Very well. That resolves the matter. You're excused.

MR. TERRY: Thank you, Your Honor.

[p. 12] THE COURT: There are a whole lot more active or even a whole lot greater inaction with respect to what's here. And if you begin to read those cases, there's a particular case – the *Bryan County* case. Look at 674 – 67 F.3d 1174. That's about hiring – that's the kind of case –

(Proceedings concluded at 2:02 p.m.)

* * *

Transcribed by: Jean Bartz

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above entitled matter.

/s/ Jean Bartz
Jean Bartz

May 6, 1996